

Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd 2016 (1) SA 306 (SCA)

*Prospecting rights under the MPRDA: Public Law Instruments?**

Will the wind ever remember
the names it has blown in the past?
Jimi Hendrix

1 Introduction

Upon enactment of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) the State became the custodian of the mineral resources of South Africa 'for the benefit of all South Africans' (s 3(1)), and the Minister of Mineral Resources became empowered to grant new types of rights to minerals, such as prospecting and mining rights to any applicant (s 3(2)(a)).

Applications for prospecting rights or mining rights have to be lodged at the office of the regional manager (ss 16(1) & 22(1) respectively). An applicant for such rights has to comply with the general requirements of the MPRDA (ss 17(1) & 23(1)(a)-(g) respectively; see further Badenhorst & Mostert *Mineral and Petroleum Law of South Africa* (2004) 15-7 to 15-8 & 16-6 to 16-7). The MPRDA has also, as its object, the transformation of the mining industry to attempt to counter the inequalities and exclusion of black people from the mining industry in the past (see s 2(d); *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* (2016 (1) SA 306 (SCA) par 16). In addition to the general requirements, the minister 'may', in terms of section 17(4) of the MPRDA, request the applicant for a prospecting right to give effect to the object of section 2(d) of the MPRDA. Compliance with transformation objectives, stated in sections 2(d) and (f), is expressly required for the grant of a mining right (s 23(1)(h)). Section 17(4) has, therefore, been perceived as discretionary, whilst section 23(1)(h) has been seen as obligatory (Dale, Bekker & Bashall *et al South African Mineral Law* (2005) 238). Section 2(d), a black economic empowerment (BEE) provision, has, as its object, the expansion of opportunities for historically disadvantaged persons to enter the mineral industry and to benefit from mineral exploitation by virtue of empowerment deals, whilst section 2(f) is aimed at the promotion of employment and advancement of the social welfare of all South Africans. Unlike mining, prospecting is not an attractive investment destination for empowerment purposes because of its high

* I wish to acknowledge the comments and suggestions of Professor JC Sonnekus to an earlier draft. I, however, remain responsible for the correctness of the end product.

costs, risks and relatively poor success rate (Dale, Bekker & Bashall *et al supra* at 240). So far, black economic empowerment deals undertaken by the mining sector have generated R101 billion in total value attributable to historically disadvantaged beneficiaries (Theobald, Tambo, Makuwerere & Anthony 'The Value of BEE deals' 2015 *Intellidex Research Report* available from [https://www.google.com.au/?gws_rd=ssl#q=Theobald%2C+Tambo+%26+Makuwerere+%E2%80%98The+Value+of+BEE+deals%E2%80%99+2015+Intellidex+Research+Report+\(accessed+2016-07-12\)](https://www.google.com.au/?gws_rd=ssl#q=Theobald%2C+Tambo+%26+Makuwerere+%E2%80%98The+Value+of+BEE+deals%E2%80%99+2015+Intellidex+Research+Report+(accessed+2016-07-12).). BEE compliance in respect of shareholding, however, remains the biggest concern for foreign companies wanting to invest in the South African mining industry (see Nkabinde 'BEE turns off US firms' (2015-07-07) *Citizen* available from <http://citizen.co.za/418054/bee-turns-off-us-firms/> (accessed 2016-07-12).

On acceptance of an application and receipt of any additional information requested, the regional manager forwards the application to the minister for consideration (s 16(5)). The power to grant a prospecting right has been delegated to the Deputy Director General of Mineral Development (DDG; s 103(1)(2); item 5 of the Delegation of Powers by the Minister of Minerals and Energy of 2004-05-12). In practice, the DDG approves and signs the recommendation of the regional manager to grant a prospecting right and grants a power of attorney to the regional manager to sign the prospecting right upon notarial execution of the agreement.

As to the legal nature of prospecting rights or mining rights, it is stated that such rights granted in terms of the MPRDA are 'limited real right[s]' (s 5(1)). A grantee of such a right is obliged to lodge the right for registration in the Mineral and Petroleum Titles Registration Office (MPTRO; ss 19(2)(a) & 25(2)(a) of the MPRDA respectively; s 5(1)(d) of the Mining Titles Registration Act 16 of 1967 (MTRA)). For purposes of registration, the 'contract' has to be notorially executed (s 15(2) of the MTRA). A prospecting right or mining right that has been registered in the MPTRO constitutes a 'limited real right binding on third parties' (s 2(4) of the MTRA). The contradiction of the creation of a real right at the occurrence of different legal acts – namely, upon grant by the minister or delegate and registration in the MPTRO – and the doctrinal difficulties caused by the poor draftsmanship of the legislature, has been raised and discussed before (see Badenhorst 'Nature of New Order Rights to Minerals: a Rubikian exercise since passing the Mayday Rubicon with a Cubic Zirconium' 2005 *Obiter* 505). The contradiction caused by section 5(1) of the MPRDA was rectified by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRDAA) which commenced on 7 June 2013 (GN R14 GG 36512 of 2013-05-31). Section 5(1) of the MPRDA now makes it clear that in the case of a prospecting right or mining right, a real right is acquired upon grant and registration thereof. Generally, a real right is created upon registration in the Deeds Office (s 16 of the Deeds Registries Act 47 of 1937) or the MPTRO (s 2(4) of the MTRA). Upon execution, a prospecting right or mining right comes into effect (ss 17(5) & 23(5) respectively, read with the definition of 'effective

date'). Nothing is stated in the MPRDA about the moment of creation or legal nature of such rights before registration in the MPTR0. Such granted rights were construed in the private law contexts as being personal rights or contractual rights (Badenhorst 2005 *Obiter supra* at 505).

In a decision by the full bench in *Meepo v Kotze* (2008 1 SA 104 (NC)), it was decided that the granting of a prospecting right to an applicant is contractual in nature (*Meepo v Kotze supra* at par 46.3) and it takes place when its terms and conditions have been determined and consensually agreed upon or consented to by an applicant upon notarial execution of the deed (par 46.3). The Court rejected the argument that a prospecting right is granted when the DDG approved and signed the recommendation of the regional manager to grant a prospecting right to an applicant (par 46.1 & 46.3; see further Badenhorst & Mostert 'Dueling Prospecting rights: A Non-Custodial Second? *Meepo v Kotze*' 2008 *TSAR* 819; see also *Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy* unreported, NCD case no 499/07 2008-02-08 par 19-21).

In *Global Pact Trading 207 (Pty) Ltd v the Minister of Minerals and Energy; the Regional Manager: Mineral Regulation, Free State Region; the Deputy Director-General: Mineral Regulation* (unreported, OPD case no 3118/06 20017-06-14 par 2), it was decided that the decision of the minister or delegate to grant or refuse an application for a prospecting right, constitutes an administrative action, as defined in the Promotion of Administrative Justice Act 3 of 2000, which administrative act has to be procedurally fair (see Badenhorst & Carnelly 'Review of a Refusal to Grant a Prospecting right – *Global Pact Trading 207 (Pty) Ltd v Minister of Minerals and Energy*' 2008 *Obiter* 113).

Therefore, the views differ as to whether a prospecting right that has been granted by the DDG is contractual in nature or merely an administrative act. The nature of a prospecting right and the bureaucratic procedure for its application – grant, execution and coming into effect – came under the scrutiny of the Supreme Court of Appeal in *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* ((2006/14) [2015] ZASCA 82 (2015-05-28)). The abovementioned amendments of the MPRDA by the MPRDAA did not apply to the case as the amendments were promulgated subsequent to the events at issue in this case (par 8).

The facts, issues and decision of the Court will be discussed, followed by a commentary about the correctness of the decision. The public law road embarked upon by the Supreme Court of Appeal will also be examined. A conclusion will be reached about the impact of the decision of the Supreme Court of Appeal as the decision was aimed at 'all other rights under the MPRDA' (par 24).

2 Facts

An application for a prospecting right by Dilokong Chrome Mine (Pty) Ltd's (Dilokong) was accepted by the Regional Manager and granted by the DDG on condition that Dilokong complied with the BEE imperative of a 26 percent shareholding in terms of section 2(d) of the MPRDA (par 3). Due to Dilokong's inability to comply with the BEE condition, a notarial deed for the prospecting right was not executed and registration of the prospecting right did not take place (see par 5). Meanwhile, Mawetse (SA) Mining Corporation (Pty) Ltd (Mawetse) also applied for a prospecting right which application was not accepted by the Regional Manager because Dilokong already held a prospecting right for the same mineral and land (par 6). In an internal appeal against the grant of a prospecting right to Dilokong, the minister upheld Dilokong's prospecting right and dismissed Mawetse's appeal (par 6).

Mawetse applied for a review of the minister's decision in the Gauteng Division of the High Court. Dilokong filed a counter-application to compel the Department of Mineral Resources to execute the prospecting right (par 6). Masipa J decided that Dilokong did not hold a valid prospecting right which could lawfully be exercised and it no longer constituted a bar to the consideration of Mawetse's application for a prospecting right (parr 1 & 2). Dilokong (fifth appellant) appealed against the decision to the Supreme Court of Appeal (par 1). The minister and officials of the Department (the other appellants) did not participate in the appeal although they made common cause with Dilokong and filed a comprehensive answering affidavit to that end in the court below (par 1).

3 Issues

At issue on appeal was whether a prospecting right had lawfully been granted to Dilokong and, if so, whether Dilokong could lawfully exercise that right. Allied to this issue, was a further question on whether that right had lapsed due to its expiry or abandonment (par 1).

4 Decision

The Court decided that a prospecting right was lawfully granted to Dilokong on condition that it comply with the section 2(d) BEE requirement of a 26 percent shareholding. Due to its failure to meet this condition, it was held that Dilokong was not entitled to exercise the prospecting right. The Court decided that Dilokong's prospecting right had expired due to effluxion of time (par 28). In arriving at its decision, different features of a prospecting right received the attention of the Supreme Court of Appeal, some of which will now be discussed.

4 1 Acquisition of a Prospecting Right

It was confirmed by the Court that the decision to grant a prospecting right is made by the DDG and not the regional manager (par 24). As will

be shown below, unlike in the *Meepo* decision (*Meepo v Kotze supra*), it was decided that a prospecting right is granted on the date that the DDG approves the recommendation of the regional manager to grant a prospecting right (par 19). Acquisition of a prospecting right thus takes place upon the date of approval.

In dispute was whether Dilokong could lawfully have been required to be BEE-compliant (par 11). It was argued that an applicant for a prospecting right could not be compelled to be BEE-compliant and the mining charter does not apply to applications for prospecting rights. The Court held that section 17(4) of the MPRDA (see par 1 above) unequivocally empowers the minister to make the grant of a prospecting right conditional upon compliance with the section 2(d) BEE requirement (par 15). The request was perceived by the Court as a necessary preliminary step to ensure compliance with the section 2(d) BEE imperative (par 15). Compliance with the request, therefore, was not merely optional (par 17). It should be added that the minister or delegate first has to consider the type of mineral or extent of the proposed prospecting project before such a request is made (s 17(4)) – which discretionary power is vague and open-ended (see Dale ‘Comparative International and African Mineral Law as Applied in the Formation of the New South African Mineral Development Legislation’ in Bastida, Wälde & Warden-Fernández (eds) *International and Comparative Mineral Law and Policy* (2005) 834).

The Court found that the DDG had lawfully requested Dilokong to comply with the section 2(d) BEE requirements, which request was acknowledged by Dilokong but not complied with (par 17). It can be added that a prospecting right is linked to a mining right insofar as the holder of a prospecting right has an exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area (s 19(1)(b)). Because of the linkage or continuity of tenure of rights, compliance with BEE requirements at the prospecting stage makes sense (as to linkage, see Badenhorst ‘Security of Mineral Tenure in South Africa: Carrot or stick?’ 2014 *Journal of Energy and Natural Resources Law* 5, 14 & 20).

4 2 Nature of a Prospecting Right

The Court rejected the decision in *Meepo* (*Meepo v Kotze supra*) that: (a) the granting of a prospecting right is contractual in nature; (b) consensus has to be reached; or (c) an applicant has to consent to the terms and conditions of the right (*Mawetse* (SCA) *supra* at parr 22, 23 & 26). According to Majiedt JA, the right is granted by the minister or delegate without the concurrence of the affected party and ‘occurs outside the ambit of and regardless of the existence of a contract between the minister and a successful applicant’ (par 24). Thus, the granting of a prospecting right does not require consensus between a grantor and grantee of a prospecting right (par 26). In conclusion, Majiedt JA stated that ‘the decision in *Meepo* that the right is granted only at the stage of the

registration of the right is wrong' (par 28). This statement by Majiedt JA seems incorrect as it was decided in *Meepo* that a prospecting right is granted upon execution of the notarial deed and not on registration (*Meepo v Kotze supra* at par 46.1).

The Court also distinguished *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* ((1991) 4 SA 718 (A)); for a discussion of the decision, see Badenhorst & Van Heerden 'A comparison between the nature of prospecting leases in terms of the Precious Stones Act 73 of 1964 and prospecting permits in terms of the Minerals Act 50 of 1991 – *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*' 1993 TSAR 159), where it was decided that a prospecting lease in terms of section 4(1)(b) of the Precious Stones Act 73 of 1964 was a contract, from the case in point on the basis that section 17 of the MPRDA differs totally from section 4 of the Precious Stones Act 73 of 1964 (see *Mawetse supra* at par 27). The similarities between the dispensation of state holding of rights under the Precious Stones Act, and the current dispensation were overlooked by the Court. It is submitted that the following reasoning by Eksteen JA in the *Ondombo Beleggings* decision is still reflective of contract law:

The fact that the [Precious Stones] Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not, in my view, detract from the contractual nature of the lease. After all, much the same circumstances pertain to numerous commercial agreements, more particularly when an individual contracts with a large corporation and is presented with a printed form of agreement. The mere fact that the individual may not readily be able to procure the alteration of any of the terms, does not detract from the fact that his acceptance of those terms would lead to a binding contract being concluded (*Ondombo Beleggings supra* at 724 F-H).

Majiedt JA reasoned in *Mawetse* that an administrative act is not changed into a contract merely because the prospecting right is 'subject to the terms and conditions' stipulated in section 17(6) of the MPRDA (*Mawetse supra* at par 27). The contractual terminology used by the legislature is, thus, treated as the consequence of an administrative decision rather than a contract.

The Court decided that the granting of a prospecting right is an authoritative unilateral administrative act by the minister or her delegate, by virtue of their statutory powers under the MPRDA (parr 24, 26 & 27). It was perceived as an administrative decision 'whereby rights are granted with or without conditions and in terms whereof rights accrue to and obligations are imposed upon the successful applicant' (par 26). This was held also to apply to all other rights under the MPRDA (see par 24). The administrative decision is thus perceived as the source of the (statutory) prospecting right, its entitlements and duties of the holder of a prospecting right.

Majiedt JA describes the nature of a unilateral administrative act with reference to the following dictum of Schreiner JA in *Mustapha v Receiver of Revenue, Lichtenburg* (1958 3 SA 343 (A) 347E-F):

In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases ... (*Mustapha supra* at par 24).

The above dictum of Schreiner JA should, in fairness, be placed in its proper context or quoted in full. The *Mustapha* decision dealt with the termination of a permit to occupy a trading site, which permit was granted in terms of section 18(4) of the Native Trust and Land Act 18 of 1936 during the apartheid era, to Indian traders on land owned by the South African Native Trust and was earmarked for blacks as beneficiaries. The termination of the permit was challenged due to the alleged cancellation solely because the holders were Indians (*Mustapha supra* at par 352G-H). Ogilvie Thompson AJA decided that if the minister (in his capacity as trustee of the Trust) granted a permit to occupy a trading site, a contract is concluded when the grantee expressly or impliedly accepts the permit (par 356D-H). According to Ogilvie Thompson AJA, the rights of the parties are defined by contract and not statute (par 356H). Thus, termination of a permit amounted to the exercise of a contractual right and not a statutory power (par 357A). According to the Court, the only way by which the cancellation of the permit could be challenged as bad law, was if an implied term that the contract would not be cancelled simply because the permit holders were Indians, could be established (see par 59A-B). In the (obvious) absence of such a term, it was decided that the trustee was entitled to terminate the permit without providing reasons for its cancellation (parr 358D-E & 359F-G). Schreiner JA agreed with the contractual construction, but, in dissent, decided that despite the contractual nature of the permit, the powers of the minister still had to be exercised within the framework of the statute and regulations (par 347D). Thus, the power to fix the terms of the permit and to act in accordance with such terms, were regarded as statutory powers (par 347E). After a review of the legislation, Schreiner JA correctly found that the minister was not empowered to terminate the permit on the ground that the holders were Indians (par 350H). In order to contextualise Schreiner JA's *prima facie* unrestricted statement, it should be noted that his sentence in the above dictum ended with a proviso, namely, 'so long as he breaks no contract', which proviso was left out by the Court in the *Mawetse* decision. Schreiner JA also distinguished the actions of the state from an owner of land, who (at that time) could exclude and eject persons from his land, by stating '[b]ut the minister has no such free hand. He receives his powers directly or indirectly from the Statute alone, and can only act within its limitations, express or implied' (par 347F-G). In other words, a proviso of statutory limitation must be added to the stated dictum of Schreiner JA to provide a complete picture of his dissenting decision.

The Court in *Mawetse* subsequently mentioned that statutory licenses are regarded as ‘public law instruments’ in English law (*Mawetse supra* at par 25). The Court referred to *Norweb plc v Dixon* (1995 3 All ER 952 (QB)) (at par 25) where it was decided that the obligation of a public supplier of electricity to supply electricity to a consumer on terms which are dictated by legislation is inconsistent with a contract. By stating the position in English law only, or in passing, it seems as if the Court hinted that a granted prospecting right is in the nature of a statutory license or public law instrument.

As to the nature of a registered prospecting right, which was not necessary for the Court to decide, Majiedt JA accepted *obiter* ‘that the right becomes a limited real right only upon registration’ (*Mawetse supra* at par 19). The Court seemed to have accepted that notarial execution of a prospecting right was required because it is a limited real right in terms of the then section 5(1) of the MPRDA (par 5). This was despite the Court’s awareness of the contradiction between section 5(1) of the MPRDA and section 2(4) of the MTRA and the Court’s view that it was not a cause for concern in the present case (par 19). As indicated before, the legislature was concerned enough to rectify section 5(1) of the MPRDA. The Court correctly indicated that the purposes of registration is also to serve as a notice to the general public, ‘akin to registration of immovable property in the Deeds Office’ (par 19). The principle of publicity of a real right is correctly used by the Court to explain and justify the real nature of a registered prospecting right. It can be added that the legislature has opted for a right that is registrable in a public office, is real in nature, and has stated *ex abundanti cautela* that a registered real right is enforceable against third parties, in order to provide security of tenure to mining companies and allay fears of insecure rights by investors in such companies (s 2(g); see, Badenhorst 2014 *Journal of Energy and Natural Resources Law supra* at 13-14 & 17-18). Security of mineral tenure is important for any developing country as it is one of the most important criteria for mining companies when deciding on investment preferences (Dale ‘Security of Tenure as a Key Issue Facing the International Mining Company: A South African Perspective’ 1996 *Journal of Energy and Resources Law* 298; Bastida ‘A Review of the Concept of Security of Mineral Tenure: Issues and Challenges’ 2001 *Journal of Energy and Resources Law* 31 & 32). The way in which Schreiner JA was quoted in the *Mawetse* decision will surely not enhance faith in security of mineral tenure in South Africa.

4 3 Content of the Prospecting Right

The Court found that the prospecting right was granted on condition that Dilokong comply with the request to be BEE-compliant (*Mawetse supra* at par 17). A prospecting right is subject to the MPRDA, applicable law and the terms and conditions stipulated in the right (s 17(6)). The Court regarded compliance with section 2(d) of the MPRDA as a condition of grant that was unequivocally imposed when the DDG approved the recommendation about granting a prospecting right (par 17). The Court

decided that, upon non-compliance with the condition, Dilokong was not entitled to exercise the prospecting right and the Department of Minerals was entitled to refuse notarial execution of the prospecting right (par 17).

4 4 Duration of a Prospecting Right

To determine the starting point of the period of a prospecting right, the Court distinguished between three distinct legal processes, namely: (a) the granting of the prospecting right; (b) the execution of the prospecting right; and (c) the coming into effect of the right (par 19).

According to the Court, the above legal processes take place at the following moments:

- (a) A prospecting right is granted on the date that the DDG approves the recommendation of the regional manager (to grant a prospecting right; par 19). From the date of the grant of a prospecting right, an applicant becomes the holder of a valid prospecting right as defined in the MPRDA (par 19).
- (b) Upon execution of a notarial deed, a prospecting right (in the nature of a contract) is not granted (see par 19 & 22-24).
- (c) A prospecting right comes into effect in terms of section 17(5) of the MPRDA on approval of the lodged environmental plan (par 19; it should be remembered that this subsection has subsequently been amended by the MPRDAA). The Court held that the decision to grant a prospecting right remains valid until set aside by a Court (par 20). According to the Court, Dilokong should have obtained a mandamus compelling the department to execute the right, if the prospecting right was lawfully granted (par 20).

It was, however, decided that the period for which the right endures has to be computed from the time that the applicant is informed of the grant (par 19, 21 & 28). For purposes of such calculation, it was held to be irrelevant that the prospecting right still had to be executed and had not yet become effective (par 21). The Court reasoned that the aim of communication of the decision was to enable the grantee to challenge objectionable conditions and alert other competitors (par 19).

Lapsing of a prospecting right, amongst other reasons, takes place upon effluxion of the time period for which the right has been granted (s 56(a) of the MPRDA) or abandonment of the prospecting right (s 56(f) of the MPRDA; par 18).

The Court found that:

- (a) Dilokong's prospecting right was granted on 21 June 2007 when the DDG approved the regional manager's recommendation to grant a prospecting right (par 19).
- (b) The period for which the prospecting right endured had to be computed from 18 July 2007 when Dilokong was informed of the grant (par 19 & 21). According to the Court, upon this date 'Dilokong became the holder of a valid prospecting right, subject to compliance with the request to prove

BEE compliance’ (par 21). This statement of the Court is in conflict with the Court’s decision that vesting of the prospecting right takes place (earlier) upon the grant. A right, whether private or public in nature, cannot vest at different moments in time and this statement of the Court about vesting upon notification seems incorrect. The same mistake was made by the Supreme Court of Appeal in *Minister of Mineral Resources of the RSA v Sishen Iron Ore* (2013 (4) SA 461 (SCA) parr 54 & 56; see also Badenhorst & Olivier ‘Conversion of Jointly-held old order mining rights’ 2014 *THRHR* 145 & 152).

- (c) Dilokong’s (four year) prospecting right had expired due to the effluxion of time on 17 July 2011 (par 21).

It was not necessary for the Court to find that Dilokong had abandoned its right due to its failure to take steps to enforce its rights (par 21).

5 Comment

The Court’s identification of an administrative decision taking place when the DDG accepts the recommendation of the regional manager, is correct. The Court’s description of the administrative act, with reference to the dictum of Schreiner JA in the *Mustapha* decision without provisos of statutory limitation, is unfortunate for the current constitutional dispensation and the custodial administration by the State of the mineral resources of the people of South Africa (s 3 of the MPRDA). Schreiner JA’s decision in *Mustapha* does not support such an unbridled state of affairs.

Although the dissenting opinion of Schreiner JA in *Mustapha* was just and correct and the majority of the Court (ironically), in a sense, ‘used’ the principles of contract to arrive at its decision, it should be noted that the decision in *Mustapha*, regarding the nature of a permit, is contrary to the decision in *Mawetse* regarding the nature of a prospecting right. Although Majiedt JA did not rely on the *Mustapha* case for his decision that a prospecting right is an administrative act, it is a pity that the Court did not deal with the *Mustapha* decision given the similarities between a permit to occupy land for trading, and a right to enter and prospect on the land (in terms of s 5(3) of the MPRDA). Just like the *Meepo* decision, the conclusion of a contract was recognised by the Appellate Division in *Mustapha*.

As suggested by the Court, the granting of (all) rights under the MPRDA by an official would be a unilateral administrative act. However, differences do exist between these rights. Prospecting rights are granted by the DDG upon acceptance of the recommendation by the regional manager, whilst mining rights are granted by the minister. These rights are registrable in the MPTR0 (s 5(1)(d) of the MTRA). Reconnaissance permits and mining permits are issued by the regional manager or Chief Director; items 3 & 11 of the ministerial delegation) and are only recordable in the MPTR0 (s 5(1)(v) of the MTRA). Different officials and different processes are, therefore, involved in the granting and issuing of rights and permits and the registration or recording thereof. Registered rights are real in nature, whilst recorded rights are not real in nature (see

Badenhorst & Mostert (2004) *supra* at 13-28 to 13-29). Thus, generalisations about the grant and the nature of rights or permits granted or issued in terms of the MPRDA cannot be made, unless the Court did not refer to permits as well. Further references to prospecting rights also apply to mining rights (but not to permits or permissions).

Whether a statutory prospecting right can be regarded as a statutory licence or public law instrument, as in English law, is another matter. A licence in English real property law is merely a permission to be on land, and can take different forms. First, a bare licence is a gratuitous permission to enter land which can be revoked at any time because of the lack of valuable consideration (see Harpum, Bridge & Dixon (eds) *Megarry and Wade the Law of Real Property* (2012) 1439). Second, a contractual licence is granted under the terms of a contract and subject to the rules of contract (Harpum, Bridge & Dixon (eds) *supra* at 1439). Third, a licence may be linked to a property interest (for instance, a permission to enter land is attached as an adjunct to a *profit à prendre* or an easement, which are proprietary rights; see Harpum, Bridge & Dixon (eds) *supra* at 1440). The first and third type of licence do not make sense in South African law due to the absence of valuable consideration as a requirement for the formation of a contract (*Conradie v Rossouw* 1919 AD 279) and the establishment of a limited real right upon creation of servitude which is not linked to a separate permission to enter land. A contractual licence was absent in the *Mawetse* decision. The nature and features of a statutory licence or public law instrument in English law and/or its equivalents in South African law, are not investigated or discussed either. Incorporation of English law by mere reference to examples in such a system, without investigating its suitability to South African law, creates legal uncertainty.

Prospecting rights or mining rights need not necessarily be treated as public law instruments. For instance, the nature of statutory prospecting or mining rights within Australian mineral legislation (with similar structures to the MPRDA) is still being examined within the paradigm of personal rights and proprietary rights (see, for instance, the examination of the legal nature of prospecting or mining licences by Hunt (*Mining Law in Western Australia* (2009) 96 & 154-155) with reference to, and by comparison with, a bare licence, a leasehold interest or a *profit à prendre* at common law (see also Badenhorst 'Towards a Theory on publically-owned minerals in Victoria' 2014 *Australian Property Law Journal* 157).

It seems that because of the transformative nature of the MPRDA, the courts try to move away from tried and tested common law concepts. For instance, in *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* (2014 2 SA 603 (CC) par 68) the Constitutional Court accepted, without investigation, that the common law supports the erroneous view that upon conversion by one of the holders of jointly held 'old order rights', the converter acquires the entire shareholding. An investigation of the common law principles of co-ownership or joint holding of real rights (see Badenhorst & Olivier 'Conversion of "old order mining rights": Sleeping at

the MPRDA's wheel of (mis)fortune? – *Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources* (unreported decision) case no 28980/10 (NGD)' 2013 *THRHR* 269, 275-277 & 281) would have indicated that the common law was actually in line with and supported the Constitutional Court's correct decision that, upon conversion and registration, the converter only acquires a new mining right in accordance with its former shareholding (parr 67, 71 & 77).

Section 15(2) of the MTRA requires the execution of a notarial 'contract' which seems to suggest that the legislature somehow had a contract in mind. It is conceded that the MTRA originally dealt with the registration of agreements in terms of the Mining Rights Act 20 of 1967 and the Precious Stones Act (*supra*), whilst the new MPRDA system was forced onto the provisions of the MTRA without proper analysis or thought. Even if notarial execution of a contract is just required for registration purposes, it cannot be without legal consequences. Such a 'contract' has, as its content, contractual rights which the Court seemed to ignore at all costs.

Upon registration of the notarial 'contract' a limited real right is created. In terms of basic property law principles, three juristic acts are involved upon the creation or transfer of a real right, namely: (a) the conclusion of a contract or obligation-creating agreement; (b) the existence of a real agreement to transfer and receive the real right; and (c) the registration of the right in the Deeds Office (Van der Merwe 'Things' in Joubert (ed) *The Law of South Africa* (2014) par 20). If by analogy, these basic principles are applied to registration of a prospecting right in the MPTR, it becomes apparent that an obligation-creating agreement and a real agreement are absent from the Supreme Court of Appeal's construction. On the one hand, the Supreme Court of Appeal recognises the legislature's creation of a (common law style) limited real right and the policy of notice of registered rights and security of tenure, whilst, on the other hand, it denies the creation of a preceding obligation-creating agreement and real agreement by consensus. Thus, a grantee acquires a public law licence prior to registration and a private law style real right upon registration which is not doctrinally sound, even though it is based on the interpretation of provisions of two sister statutes. The unilateral administrative right precedes the possible conclusion of a contract (with the same or even different terms) at a later stage. The Court acknowledged that the grantee may still challenge and object to some of the conditions after granting a prospecting right (*Mawetse supra* at par 19), which seems odd as the prospecting right has already been granted in a unilateral manner. In practice, negotiations as to the terms and conditions to be embodied in the prospecting right or mining right do take place (Dale in Bastida, Wälde & Warden-Fernández (eds) *supra* at 828). It is submitted that upon notarial execution of the deed, a contract is created between the parties. A unilateral administrative decision is followed by the conclusion of a 'prospecting contract' and the acquisition of a real right upon registration. The failure to recognise the different juristic acts that are taking place can be attributed to the fact that the MPRDA does not

distinguish between the prospecting right as an agreement, and the prospecting right as a contractual right or real right. If the basic principles of contract law and property law had been taken into account by the Supreme Court of Appeal, the presence or absence of different juristic acts could at least have been considered. If a limited real right can be regarded as a trusted friend for purposes of security of tenure and an object of real security, why should the preceding contract be ignored?

The Court does not convincingly explain why the duration of a prospecting right does not have to be computed from the time that a prospecting right is (administratively) granted. Computation from notification of the grant does not fit the mould of a unilateral decision taken by an official free from notions such as consensus. Or, is the custodian's common courtesy merely the starting point for calculations, and how is it to be determined if the custodian, at times, is not so courteous?

The creation of rights by virtue of administrative acts can be conditional. If the granting of a prospecting right is subject to a suspensive condition, the vesting of the prospecting right must have been suspended until the BEE requirements were met. If the grant is subject to a resolutive condition, the grant of the prospecting right would have been terminated upon non-compliance with the BEE requirements at the date which was proposed for notarial execution. If so, the examination of the duration of the prospecting right and its termination by effluxion of time was unnecessary as the prospecting right no longer existed. The Court accepted the view of the court-a-quo that Dilokong's failure to meet the BEE condition had the effect of barring Dilokong from implementing its right to prospect (*Mawetse supra* at par 17) which says nothing about the vesting or termination of the right.

Upon approval of the regional manager's recommendation, the DDG performed a unilateral administrative act. In the absence of notarial execution of the agreement, the Court could have confirmed that a contract was not concluded. It is arguable that notarial execution is not required for the validity of the contract (as was the case with mineral leases in terms of section 3(1) of the General Law Amendment Act 50 of 1956) but only for the purposes of registration. Notarial execution of a contract cannot be without legal consequences.

6 Conclusion

The law in accordance with the *Mawetse* decision now states that upon approval by the DDG of the recommendation of the regional manager (to grant a prospecting right), a prospecting right is granted in terms of the provisions of the MPRDA whilst, upon registration in the MPTR0, a prospecting right (which is real in nature) is created. In short, the accrual of a magical public law creature is followed by the creation of a common law style real right. The recognition of a unilateral administrative act on the part of the DDG, when the recommendations of the regional manager

are accepted, should be distinguished from what takes place legally after such a decision until registration of the prospecting right in the MPTR0. During this interim period, the conclusion of a contract, with personal rights as its content, is still legally possible. Objections by the grantee, after the grant has been recognised by the Supreme Court of Appeal, and negotiations after the grant still take place in practice, until such time that a notarial contract is finalised. As decided in the *Meepo* decision, and rejected as incorrect by the Supreme Court of Appeal, conclusion of the contract takes place upon its notarial execution. The notarial execution of a contract cannot be stripped of possible legal consequences or simply be ignored, otherwise, notarial execution is simply a formalistic requirement for the purposes of registration, which the Supreme Court of Appeal should have clearly stated. A unilateral administrative decision can be followed by the conclusion of a contract and, eventually, be followed by the creation of a limited real right upon registration. Private law doctrine need not always be discarded by the winds of change.

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